

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re IDA LOTTI REVOCABLE TRUST.

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LINDA LOCKEN, Trustee,

Petitioner-Appellee,

v

ANDREW LOCKEN,

Respondent-Appellant.

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UNPUBLISHED  
February 12, 2008

No. 274810  
Oakland Probate Court  
LC No. 2006-305483-TV

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Respondent appeals as of right from a probate court order holding that he was not entitled to take as a beneficiary under the terms of a trust. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Ida Lotti, the mother of petitioner Linda Locken, executed a trust on December 21, 1991, which provides that the trust principal and income would be held for the benefit of her husband, Angelo Lotti, during his lifetime. After his death, or upon Ida's death if she survived Angelo, the trust assets were to be divided between two groups composed of Ida's two daughters, their husbands, and their children. The clause indicating the share to be taken by petitioner and her family states:

One such share shall be distributed equally among the then-living members of a group made up of the Settlor's daughter, Linda Locken, her husband, Andrew Locken, and their two children, Angelo V. Locken and Anthony Locken.

Language in another clause similarly named Linda's sister, Laura Cass, and her husband and children, as a beneficiary group.

Ida Lotti died on August 2, 1992, less than a year after establishing the trust. Lotti's husband, both of her daughters and their husbands and five grandchildren survived her. The trust was administered for the benefit of Angelo Lotti until his death on October 30, 2005. Between the deaths of Ida and Angelo Lotti, petitioner Linda Locken and respondent Andrew Locken

divorced in 1999. Their judgment of divorce contained a provision that stated, “Each party shall receive their own inheritance by operation of law.”

The probate court determined that Andrew Locken was not entitled to a distribution from the trust. The court found that Andrew Locken “only received his status as beneficiary based on his marriage to Linda” and that “under the terms of the Judgment of Divorce such benefit has been waived.” Accordingly, the court concluded that Andrew had waived his right as a beneficiary under the terms of the trust.

On appeal, Andrew Locken argues that the phrase “her husband” before his name in the trust document is merely descriptive and not intended to impose a condition that he still be married to Linda Locken at the time of distribution.

“[T]his Court reviews de novo the language used in wills and trusts as a question of law.” *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). “A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible.” *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). Unless there is an ambiguity, “the ‘intent’ is to be gleaned from the [document] itself.” *Id.* “[I]f a will evinces a[n] . . . ambiguity, a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction.” *Id.* “The rules of construction applicable to wills also apply to the interpretation of trust documents.” *In re Reisman Estate*, *supra* at 527.

The general rule is that “[a] testamentary gift to the ‘husband’ or ‘wife’ of a designated person . . . may be claimed by the individual who occupied that status at the time the will was made,” even if the parties subsequently divorced or the marriage was annulled. 80 Am Jur 2d, Wills, § 1073. “The presumption that the testator intended that the donee should take although divorced is strongly fortified where he or she is named as well as described as ‘husband’ or ‘wife.’” *Id.* We find nothing in the language of the Ida Lotti trust instrument to defeat this presumption. Rather, the words “her husband, Andrew Locken” evince Ida Lotti’s intent for Andrew Locken to be a beneficiary of the trust, regardless of whether he and Linda Locken were still married when the trust was distributed. This conclusion is reinforced by the inclusion of a condition to be met by the named beneficiaries at the time of distribution, namely, that they must be “then-living.” If Ida Lotti had also intended to condition any distribution to her sons-in-law on their still being married to Lotti’s daughters at the time of distribution, similar language could have been included.

Additionally, Andrew’s interest in the trust vested when Ida Lotti died, not when Angelo Lotti died. “A remainder interest vests upon the death of the grantor, not upon the death of the life tenant.” *In re Childress Trust*, 194 Mich App 319, 323; 486 NW2d 141 (1992). Therefore, when Ida died, all of the named beneficiaries of the trust, including Andrew, had vested remainder interests in the trust assets. Andrew and Linda Locken were still married at this time.

It appears that the probate court determined that the parties’ divorce judgment operated to divest Andrew of his beneficiary interest in the trust. The court concluded that the divorce judgment “provides that each party waived any rights he or she had to any inheritance by virtue of the marriage.” “Waiver is the intentional relinquishment of a known right.” *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006), quoting *Bailey v Jones*, 243 Mich 159,

162; 219 NW 629 (1928). While there is no “magic language” necessary to waive a right, “a waiver must simply be explicit, voluntary, and made in good faith.” *Sweebe, supra* at 157. Whether the facts of a particular case constitute a waiver is a question of fact, which this Court reviews for clear error. *Id.* at 154.

The divorce judgment provides that “Each party shall receive their own inheritance by operation of law.” The term “operation of law” refers to “[t]he means by which a right or a liability is created for a party regardless of the party’s actual intent.” Black’s Law Dictionary (8th ed). Far from waiving a known right, the judgment of divorce specifically preserved to each party whatever inheritance rights he or she was entitled to receive “by operation of law.” Furthermore, Andrew Locken’s interest in the Ida Lotti trust did not arise by operation of law, but rather by him being expressly named as a trust beneficiary. Ida Lotti intended Andrew Locken to be a trust beneficiary and his interest as a beneficiary vested when Ida died. The provision in the divorce judgment does not affect that interest. The probate court erred in concluding otherwise.

Reversed.

/s/ Michael J. Talbot  
/s/ Mark J. Cavanagh  
/s/ Brian K. Zahra